A Practitioner's Guide to the Use of Exhibits and Expert Testimony

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Upon effective handling of exhibits and expert testimony may depend the outcome of the trial. The growth and change of science and the economic system, complicating business and other transactions have necessitated changes in trial technique. No longer can an ordinary witness testify, from personal knowledge, to all the transactions of a large business. Nor, because of specialization, can an ordinary person testify accurately in scientific matters involving many technical details and knowledge. These changes, accentuating the importance of exhibits and expert testimony, have loaded new duties and responsibilities upon the practitioner.

This article is concerned with the practical problems of presentation of exhibits and expert testimony rather than being a dissertation upon the law governing their presentment. However, in discussing the mechanics of presentation it is necessary to keep in mind the rules of evidence.

EXHIBITS

Statutes Relating to Exhibits

Preliminary to a discussion of these problems, mention should be made of the main Ohio statutes which the trial lawyer should examine if he knows that he is going to deal with exhibits in the trial of a case. Section 154-18 provides for the admission in evidence of an authenticated copy of a record, official paper, or certain other instru-

ments of any executive department of the state of Ohio. Section 11500 makes similar provision for certified copies of papers, books and records on file with either state officers or with the executive department of the United States government. Sections 12102-26 to 12102-30 make admissible in evidence reports made by officers of the State of Ohio, or certified copies thereof, dealing with matters within the scope of their duties. Section 4235 provides that by-laws, resolutions, minutes of proceedings and ordinances of a village or city may be introduced in evidence by use of certified copies. Although many lawyers call the city clerk to prove the existence of an ordinance, clearly this is no longer necessary. If an attorney has a certified copy, one that is properly authenticated, and it is material and relevant to the case, all that is necessary to be done is to have it marked exhibit 1, (or whatever it may be) and simply tender it in evidence.

In dealing with a Michigan, Illinois, or Indiana guest case, or with the law of any other state, it has been necessary in the past to introduce evidence as to the statutory law of that other state. This was customarily done either by calling in someone familiar with the law of that state, or by stipulating with opposing counsel as to what the foreign statutes provided. Now, however, under the Uniform Judicial Notice of Foreign Law Act as recently enacted in Ohio,[1] a trial court is required to take judicial notice of the statutes of every state, territory, or other

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[1] OHIO GEN. CODE 12102-31 to -37.

jurisdiction of the United States. The act, however, refers only to statutory law, excluding common law.[2]

With respect to the adjudicated cases that comprise the latter body of law, Sec. 11499 provides that the common law of any other state or country may be shown by parol evidence, or by books of reported cases adjudicated by the courts of such other state or country. The customary method of getting those reports in evidence has been through stipulations with opposing counsel. It has been the writer's experience that nearly always counsel will stipulate that the decisions in the library sets of the Reporter system, or the official state reports, may be used to show the common law of the state in question. Usually a stipulation can be had to the effect that tender of the volume in evidence is unnecessary, a typed copy being sufficient. Frequently opposing counsel will stipulate that it will not even be necessary to type out the foreign decision and physically tender it in evidence, or attach it to the bill of exceptions; but that the trial court, or any reviewing court, may refer to the reports which are in the law library for a study of the decision offered in evidence. In such event, all that is necessary is to say, "I offer in evidence the case of *Waters* v. *Andrews,* 117 Mich., 225," leaving to the trial and reviewing courts appropriate reference to the decision. If stipulations of this character can not be obtained, however, then it becomes necessary to secure someone to prove the decision. That may be done by calling a lawyer from the State of Michigan, for example, to prove that the particular reported decision is the official report of that particular state.

Ohio General Code, Secs. 12102-17 to -21 make admissible in evidence a composite written report of a finding

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[2] *See* Hallen, *Uniform Evidence Acts in Ohio,* (1939) 6 OHIO ST. L. J. 25, note (1941) 7 OHIO ST. L. J. 451.

of facts prepared by an expert and containing conclusions resulting wholly or partly from written information furnished to such expert by the cooperation of several persons acting for a common purpose. These are important provisions, with respect to both exhibits and expert testimony, obviating as they do the calling as witnesses of the persons furnishing such information and the production of the books or other writings on which such report and finding is based. Because there are no reported cases dealing with these new sections, it is impossible to say what interpreting limitations, if any, will be imposed by the trial courts, but it is a matter worthy of the practitioner's attention.

In the past, lawyers have had a great deal of difficulty in getting business records in evidence, because of the failure to bear in mind the requirement of the best evidence rule that original entries, for instance, and not some summary or copy must be introduced. The problem has been simplified somewhat by Ohio General Code secs. 12102-22 to -25, recently enacted. These sections make business records admissible to the extent that they reflect the usual course of doing business.[3] Clearly, of course, any record that is made for the purpose of a lawsuit, or any report of some special investigation that may be made because of some dispute or some litigation, would be excluded, as not made in the ordinary course of business conduct.

Other sections frequently overlooked include Ohio General Code, Sec. 11550, which may be utilized for the purpose of proving the genuineness of a document. Under that section, there is created the right in advance of trial to exhibit a document to opposing counsel and to demand admission of its genuineness; if that admission is refused

[3] *But see* note, Admissibility of Hospital Records, (1940) 7 OHIO ST. L. J. 248.

the party so refusing is compelled to meet the expense to which the offering counsel is put in proving genuineness. Ohio General Code, Secs. 11551 *et seq.*, provide for the production of certain books and writings and for the right of inspection and reproduction.

Mechanics of Offering Exhibits

Certain preliminary steps should be taken before offering an exhibit in evidence, whether it be a photograph, letter, or X-ray plate. The proper thing for the lawyer to do, when he wants to offer it in evidence, is to hand it to opposing counsel, allow that counsel opportunity to inspect it, and then hand it to the court reporter and have him mark it as an exhibit. These preliminaries over, place the exhibit in the witness's hand and proceed in this fashion: "Mr. Brown, I hand you a paper here purporting to be a letter (or photograph, *etc.*) marked exhibit 12, and I ask you to state what this is." To which Mr. Brown will reply, "It is a letter from so-and-so." Many times it is advisable, almost necessary, to substitute a copy for the original exhibit. Usually, consent of opposing counsel can be obtained for this. In that event it is advisable to have the court reporter make up a copy and have it compared by counsel on each side, and then have the copy marked as an exhibit, with the stipulation in the record that this copy is to be used and substituted for the original. Upon identification by the witness the exhibit may then be offered; and if material, competent and properly identified, it will be received in evidence.

The exhibit should not be shown to the jury until it has been thus received. Many times in the trial of cases counsel will proceed to exhibit to the jury a letter or other exhibit prior to this time. That is improper, for the jury has no right to see any exhibit until it has been received in

evidence. If the exhibits are photographs of a damaged car, or several photographs of the scene of a collision, time may well be taken to pass them along to the jurors for their inspection. After reception of an exhibit in evidence is also the correct time for objections by opposing counsel on the ground of insufficient identification or because of immateriality, or for any other reason. If the party offering the exhibit asks of the witness a number of questions, the answers to which would require the exhibition of that exhibit to the jury, opposing counsel should insist upon a ruling on its admissibility before any such exhibition takes place.

Should the court have some doubts as to its competency or identification, he may, before ruling on the offer, give permission for cross-examination of the witness as to the exhibit and particularly as to its identification. If, before the receipt of an X-ray exhibit in evidence, the court permitted the offering counsel to ask the witness to point out to the jury what the X-ray plate shows and to question him about it, objection later to its reception in evidence would not undo the damage already done. If the exhibit happens to be a letter or any other document, opposing counsel has the right, and it is entirely proper for him, after the exhibit is offered in evidence, to read it then and there.

When dealing with an opponent's exhibits, insist upon this right to see them before they are handed to the witness. As there may be something in them that is helpful to your client and harmful to the opposing case, it is well to examine them very carefully. If questions suggest themselves as to the qualifications of the witness who has made the exhibits, be he a photographer, a surveyor, or an X-ray man, or if there is some objection to their identification, objection should be made to the exhibits being received in

evidence until opportunity has been had for cross-examination of the witness with respect to them.

To challenge the admissibility of an exhibit offered in evidence, a general objection is sufficient to cover any question of identification, competency, or materiality. However, if the court requests the ground of objection, it is the duty of opposing counsel, of course, to state whether the objection goes to the method of proof, that is, to the manner in which it is identified, or whether it is made on the ground of materiality. If several objections are offered at one time, it is well to act separately as to each. The writer recalls one Court of Appeals case some time ago in which certain exhibits *A* to *L* had been offered in evidence at the trial in the Common Pleas Court. Objection had been made in this form: "I object to their being received in evidence"; the trial court had overruled the objection, and all had been admitted. The Court of Appeals found that among those exhibits two were not admissible, but held that the overruling of the general objection as to *A* to *L* was not sufficient to constitute error.

On direct examination it is ordinarily best to offer an exhibit immediately upon its identification by the witness testifying. Especially is this true where the witness is to be asked a number of questions which will require him to use the exhibit and to display it to the jury. However, inasmuch as the offer of exhibits in evidence may be made at any time after proper identification, they may be saved until conclusion of the direct examination. But it must be remembered that a delay until the witness has been excused may result in a court ruling that the exhibit has not been sufficiently identified, or that it has not been shown to be material.

It may develop that an exhibit, although fully identified, is not admissible in evidence because it has not been

sufficiently connected up with the issue. For instance, in the case of a photograph or a diagram of the scene of an accident, the photographer or the surveyor may identify it as a correct representation of the intersection at the time he made the photograph or made his measurements, but it may be inadmissible because it has not been shown that the intersection was in the same condition at the time of the accident. In such an event, the court will exclude it. Later, after adequate connecting up, the exhibit should then be re-offered in evidence. If material, the court will then probably admit it.

In the handling of exhibits several practical problems arise. Thus a lawyer often has to face the question whether or not a number of exhibits should be offered as a series or separately. Certain exhibits will be desired in evidence as a series or not at all, where harm can be done if only some are admitted although all together they would be helpful. Thus if they are offered separately, and several of them taken alone may be helpful to the opposing party, the court may on opposing counsel's objections exclude a portion only, admitting those affording the opposing party information and help; whereas if all had been admitted they would be helpful to the offering party. Again, when an exhibit, such as a letter or document or statement, consists of several pages or parts, it is well to have them numbered 1, 1-a, 1-b, *etc.*, so that the record will clearly show how many pages comprise the exhibit. And once an exhibit has been introduced and first reference had to it, further questions or statements concerning it should always be in terms of the exhibit number or mark, rather than "this picture," "this paper," or "this letter." Otherwise, in the event of a later appeal, the reviewing court may reject a contention that the trial court should have allowed certain questioning regarding the exhibit,

simply because, with the record speaking only of this or that letter or photograph, it cannot determine what exhibit is involved.

When the exhibit speaks for itself, counsel is not permitted to ask the witness for explanation. For instance, where a witness has presented to him a self-explanatory letter, he cannot properly give his opinion or conclusion as to its contents. He may, however, state that it is a letter dated so-and-so and addressed to so-and-so. In order to get in evidence a photograph of a scene of an accident, it is necessary to show that the photograph is of the particular intersection involved. Consequently, the photographer may be asked about it; and he is permitted to say that it is a photograph of the intersection and to describe the position in which it was taken. But ordinarily he cannot be led into a description of what the picture discloses, when the picture speaks for itself. If it is a picture of a car, the photographer may properly say, "That is a picture of Mr. Jones' car," but he may not say, "That shows that the left front fender has been bent and the frame knocked out of line." Yet where an attorney finds that certain changes or alterations have been made in the exhibits which he wishes to offer, it is well and competent to allow the witness to account for those interlineations and erasures, rather than to open them up to an attack by the other side.

Often an exhibit is admissible only for a very limited purpose. For instance, it may develop that a picture taken of an intersection is not admissible for all purposes because the condition at the time of the accident was different from what it was at the time the photograph was taken, yet the picture will accurately show an obstruction to the view, the very condition which existed at the time of the accident; or perhaps the picture will show the location and

wording of a stop sign as the same existed at the time of the accident. In such event, the picture is admissible to present such limited features. If an exhibit is wanted in evidence for a very limited purpose and a general tender is refused, the court should be apprised of the limited purpose of the offer and the record made to show that fact. The court may then admit it for that limited purpose. Where, on the other hand, the opposing counsel offers in evidence an exhibit which is admissible only for a limited purpose, and the court admits it on that limitation, care should be taken that the court instructs the jury on this fact either at that time or in the general charge.

If in the trial of a case counsel identifies a great many exhibits and at the close of his presentation of evidence he is not sure whether or not all that are wanted in have been offered, it is advisable to re-offer them. As a general rule, the court reporter will keep an accurate record of those which have been actually offered and those which have been received, but where there are many of them it is well to guard against any possible omission or error on his part. It also sometimes happens that some exhibits have been rejected because they have not at the time of their offer been properly connected up with the matter in issue. If later that connection has been made, it is then advisable to make another offer at the close of one's case, of those which have been rejected.

Identification of Specific Exhibits

In identifying a letter from the opposing party to one's own client, the fact that it is on his stationery is not sufficient. Proper identification may be had by calling the opposing party to prove his signature, or by showing that the letter is in answer to one of your client's. In the latter case it would be necessary to prove the correspondence

which prompted the answering letter. To do this the other party may be called upon, either before or at the trial, to produce that correspondence. If not produced, a copy of the letter, upon a showing by the stenographer that it was dictated to her and by her typed out and mailed addressed to the other party, is sufficient. In that way it is shown, prima facie at least, that the opposing party received it; the reply letter will then be established as having been written by the opposing party. Clearly, letters or exhibits sent by one's own client are not admissible if self-serving; they can be used only where part of a series of correspondence between the parties.

A diagram should be checked for accuracy inasmuch as admissibility of this type of exhibit may depend upon various aspects of this factor. Pertinent, for instance, is the question whether it reveals all the objects which are within the area that is shown; whether it is drawn to scale; whether it constitutes a true representation; what the skid marks and lines indicate; and whether it shows the condition as it existed at the time of the accident. To be admissible a diagram does not necessarily have to reveal every object within the area, but it should be a fair representation of the situation. Considerable discretion is lodged with the trial court in the determination of whether it is fairly representative, only after which is it admissible.

Recent years have seen considerable relaxation of the rules of evidence with respect to X-rays. Formerly the X-ray expert was required actually to have been present when the X-ray was taken, and either to have himself developed it or to have had it developed or marked in his presence. But while the rule has been relaxed in many jurisdictions so as to permit it to be identified by one under whose supervision it was taken, identification should still be carefully made and opposing counsel required properly

to identify his X-rays. In general, the witness should state the manner in which the X-ray was taken, the position of the subject, the position of the X-ray machine, showing the angle of the view, the length of exposure, the type of machine, and the fact that it was in good working order.

The matter of the angle of the view is very important. The writer tried a case recently in which certain X-rays of the skull were offered in evidence by the opposing counsel as proof of the existence of a fracture. In refutation it was contended that although certain lines appearing in those X-rays were identified as fracture lines, they were not fracture lines at all, but on the contrary were mere suture lines in the back part of the skull. The pictures had been taken through the mouth and in such position as to show those suture lines and make it appear as if there was a fracture of that part of the skull through which the spinal cord passes. The doctor who so testified on the basis of the plates also produced other X-rays of the same part, taken, however, through the top of the skull. From this angle no fracture lines appeared, thus confirming that the pictures taken through the mouth simply showed the suture lines as fracture lines. Regardless, then, of the extent to which rules of evidence have been or will be relaxed, it is important in handling X-rays to know the position of the machine and the angle from which the picture was taken.

Photographs, like X-rays, are apt to be deceiving. Thus photographs of an intersection may show an apparent obstruction by a hedge, when in fact the hedge did not obscure the view at all. The writer recalls one situation in his practice where the claim that a hedge obscured the view constituted a rather important issue in the case. The hedge having been cut down shortly after the accident, the ques-

tion of obstruction consequently depended on oral testimony and on photographs of earlier date. One picture presented showed such an apparent obstruction as to have made it impossible for one to see an approaching automobile; it appeared that the hedge ran out to the sidewalk, and that the hedge was high enough to obscure the view of any vehicle except a high truck. But it developed on cross-examination that the camera had been placed about one foot or eighteen inches above the ground. A photograph taken five or five and one-half feet off the ground, at the height of the eyes, showed no obstruction whatever. A lawyer should, therefore, carefully check the background of photographs offered by opposing counsel; at the same time he should take care that his own are fair pictures, for if not, discovery may harm his case.

Also important in photographs are the focal length of the lens and the type of the film. People familiar with photography know that the shorter the distance between the lens and the plate, the greater is the view across laterally and the shorter the view longitudinally. Thus with a picture of a street taken looking toward an intersection at, say, one hundred feet back from an intersection, a normal focal length lens will quite accurately reflect the distance from the camera to the intersection and the width of the street; whereas an abnormally short focal length lens will make the same distance appear to be about 15 feet while exaggerating the width of the road, thereby creating a false impression. Difference in film is important, for one film will show black and red to be exactly the same; while another will give a difference in shades of gray between the two colors. If there appears to be some trickery about a picture, it is well to ask for the production of the original film rather than accepting a print. It is not always necessary, in order to get a photograph in evidence, to call the

photographer or other person who took the snapshot. Considerable discretion is allowed the trial court in such matters. The test is whether it is a fair, accurate representation of the condition which it purports to show.

Pleadings may be used as exhibits, and sometimes are important. The writer recalls one case he defended where there was involved an injury occurring to a doctor while he was crossing an intersection. He suffered some broken bones, but there was some question about the extent of his disability and the permanency of it. It was just by chance that I discovered that about six months before that same doctor had had another accident in an adjacent city. The plaintiff's pleadings in that case carried allegations regarding trouble with the left leg, that he suffered constant headaches, which continued up to the date of the filing of the petition, and that he had permanent scars on his face. In the later case the same things were alleged; yet the petition in the earlier action had been filed after the second accident.

The plaintiff did not know or even suspect that the defense had any knowledge of the other accident. I succeeded on cross-examination in getting the doctor well committed to the proposition that all the complaints mentioned at the time of trial for the second accident were traceable to it. Then he was confronted with the petition in the Fremont case, a certified copy of which was offered in evidence and received. On further cross-examination the plaintiff tried to lead the jury to believe that the injuries received in the other accident were minor and of little consequence. But the other case having been already tried, he was then confronted with a transcript of the record therein which he had testified at great length about the suffering he had endured as a result of the accident in Fremont, not mentioning in that case the Toledo accident,

and blaming the Fremont accident for all his physical ills. Upon denial of this testimony, the Fremont Court Reporter was called to prove the correctness of the transcript and of the answers which the plaintiff had given in that case. The plaintiff was thereby so completely discredited that, while the case took eight days to try, the jury was out only eight minutes and returned a unanimous verdict for the defendant.

In presenting a weather report in evidence, the proper procedure is to call the United States Weather man, and develop from him what records are kept in the ordinary course of business, and that the record that he has brought along with him is the true record that was kept. The report is then ready to be introduced in evidence. Whether it will be admitted will depend somewhat on the relative locations of the weather bureau and the place of the accident. A weather report for Toledo would not be good for Fremont.

Judicial notice of mortality tables is usually taken by courts. In those which do not, it is advisable to offer the tables in evidence. It may be advisable in any event in order that the jury will learn about them. Statistical books or almanacs giving the time of sunset, sunrise, logarithms, weights, measures, computations of interest, and so forth, are admissible in evidence. Texts, however, on medicine or surgery, or any of the inexact sciences, are generally held not admissible in evidence as proof of the facts which they contain. However, excerpts may be admissible to impeach a doctor or expert who has testified as to what a particular text states.

Expert Testimony

Expert testimony has taken an important place in evidence presentation. In its infancy the idea was a very

good one, growing out of the not infrequent necessity of admitting in evidence certain deductions from observed facts, to make which requires scientific or specialized knowledge or experience not possessed by the jury. For instance, jurors cannot from their general common sense and experience judge as to cause and effect in the medical field. With the triers of the facts thus unable to perform their peculiar function in such areas, provision is made for its performance by those capable of doing so. The general rule of evidence against opinion testimony is thus relaxed to admit the "expert," who has been variously defined as a man of science, a person cognizant or possessed of science and skill respecting the special subject-matter at hand, or one who has made the particular subject a matter for especial study, practice or observation. Abuses in the use of this type of testimony have, however, become so frequent and so great as to precipitate a very serious discussion among lawyers and laymen regarding the desirability of imposing some limitation on the practice. The central evil, of course, is that an expert or so-called expert can be found to testify to any opinion which a client or his lawyer may wish. Of the four types of expert, the dangerous one, clearly, is the dishonest but well qualified witness. Such a person knows his subject, he can handle himself well on cross-examination, and he is unscrupulous in his resort to lies and trickery if seemingly required to get his ideas across to the jury.

Selecting, Preparing and Qualifying the Expert

Many times the expert will in effect have been selected before the attorney is retained. An illustration especially in point is the case of the client's attending physician in instances of personal injury litigation. When such is the situation one must make the best of it. Where, however,

counsel has control of the choice of an expert desired for particular testimony, the matter of selection is of such importance as to merit his great care. A personal recollection from the writer's own practice will again serve to illustrate. Successful in securing a new trial in a case involving an alleged defect in the manufacture of a ladder, after experiencing an unfavorable verdict for $25,000, I went out in search of an expert. The search ended at the Forest Products Laboratory, in Wisconsin. The wood expert found there was so well informed that on the retrial defendant received a unanimous verdict. This authority on woods was a real expert, the very one, it turned out, to testify later in the Lindbergh kidnapping case.

In considering the educational background of a possible expert, it is well to inquire into the extent of his practical experience as well as the particulars of his formal training. Further, his reputation among other experts in the same field, and the repute which he enjoys among the laity, are important. Not only does a high standard of ethics impel the attorney to avoid the dishonest expert; it is the best policy, for such a person will eventually reveal himself for what he is. Of great importance also is the ability of the expert to make a good witness. Extensive practical experience and other seemingly favorable qualifications will go for naught if he is unable effectively to impart his special knowledge in such a way as to convince the jury.

The expert who is chosen by the above tests should be informed of all the facts concerning the matter in relation to which he is to testify. Moreover, he should be made acquainted with related matters as well; thus a medical expert who is retained to testify as to cause and effect in the case of an injury to the head should know the facts regarding other injuries suffered by the client. Let the

expert be the judge of what is material and what is not; he is in a much better position to judge than is the attorney. Review with the expert the questions it is proposed to ask him, and ascertain the answers he will give. Often it will be profitable to have him assist in the preparation of questions. Some lawyers used this latter technique with hypothetical questions, while others themselves prepare them for advance submission to the expert. In either event, where the expert is to be asked a hypothetical question counsel must know what the tenor of his answer will be if all chance of unfavorable response is to be eliminated. With question and answer worked out in advance of trial, it sometimes develops that the factual basis assumed in the question is not borne out by the evidence later presented. The expert should be informed of the rephrasing of hypotheticals necessitated by this variance; otherwise he may think the refashioned question calls for an opinion different from the one actually wanted.

Make sure in connection with question preparation that all interrogatories to be directed at the expert are couched in language which the jury can understand. Many doctors go on the stand and testify in very technical language. They talk about a comminuted or a compound fracture, a thrombosis, or an ecchymosis—terms wholly meaningless to the jury. It is for the attorney, if representing the party calling the expert, to make sure that the jury is enlightened, through the use by the expert of ordinary English, as to what the situation is, and to see that the questions and answers present to the jury a logical, forceful case. But important as is this factor, it is not the only one compelling the careful attorney to be thoroughly prepared in the area of *expertise*. For even though he does not expect to call an expert, the other party may. In any case, therefore, where expert testimony is a possibility, counsel should

thoroughly familiarize himself on the subject in hand by a study of the literature available. In the preparation of the ladder case, previously mentioned, the equivalent of a week was spent reading literature on the subject. Not that the attorney can hope to know as much as an expert, but at least he can talk intelligently on the subject. He should also supplement his reading by discussions with experts. There are times, of course, when from the financial aspect a case doesn't warrant the expenditure of any large amount of time and effort; but if a case is to be won, study had better be spent whether remunerated or not.

If the expert to be called hasn't had much court experience, he should be advised as to what should be his manner and bearing in court towards the judge and jury and toward opposing counsel. He should be advised how to state his various qualifications without appearing to be boasting or bragging. Some expert witnesses simply destroy themselves by telling about their experience and background in such a way as to make it appear they believe they know more than anybody else in the world. Proper cautioning of the inexperienced expert should prevent this.

To qualify the expert upon his taking the stand, he should first be asked to state his name, his present address and how long he has lived there, and his profession. This preliminary over, his background should then be brought out. Generally, this is best done on a chronological basis. Thus with a doctor the questioning would pass from his pre-medical education to where he had received his professional training, where he had interned and for what period of time, how long he had been engaged in the general practice, and whether he followed any specialty. If he is a specialist the nature of this special capacity should be explained to the jury. Description of post-graduate work, hospital connections and medical association membership

concludes the qualifying picture. It is then for the judge to determine whether the witness is an expert; clearly, he himself is not qualified to decide this question but only to state the facts upon which the court can reach a reasoned conclusion. With wide latitude accorded the trial judge on this matter of the qualification of experts, his ruling is generally conclusive. However, he must act upon the basis of the evidence put in as to the witness's educational background and experience; he cannot rely upon his own acquaintanceship with the witness. The expert can be qualified only by sworn testimony.

Sometimes opposing counsel will waive qualification. It is not always advisable to accept this proffer. For instance, if the opposing party has used a so-called expert who has not made the best impression, it is good tactics fully to qualify an expert of opposite view as an aid to convincing the jury of the soundness of the contrary opinion. There is a right to show, and the jury has a right to hear, what the opposing expert has to say regarding his authority to speak. In that way judge and jury are enabled to place reliance where it belongs.

The Course of the Expert Testimony

There are two methods by which the expert's testimony is to be elicited. He may be one who, in the case from the start, has had something to do with the situation and is therefore in a position to review the facts as well as to offer his opinion. With an attending physician on the stand, for instance, there should first be introduced in evidence the facts to which he can personally testify. His opinion as to disability and permanency of injury may then be asked. Having treated the party involved, it is proper to request him directly, without the use of a hypothetical case, to give his opinion, if he has any, on those questions.

Use, however, of the expert witness who has never treated or examined the plaintiff, but who is called merely to give his opinion as to cause and effect, calls for employment of hypothetical questions. Basically, this technique involves a request of the expert that he give a judgment based upon certain facts which have been testified to by other witnesses and which are brought to his attention specifically by the hypothetical question.

A wide range is ordinarily given to counsel in the putting of such questions. The questions may be short, or they may be long. In one case, within the writer's knowledge, there were put to three experts two identical questions comprising 36,000 words, and taking four hours to read. The trial court has considerable discretion with respect to a hypothetical question, as to whether or not it is confusing to the witness or the jury, is unnecessarily long, or a response to it is likely to be of any material help to the jury. The court may, if he wishes, direct that the hypothetical question be reduced to writing, so that he can properly pass upon it. Or a witness may ask to have it written out for careful study; and the court will ordinarily accede to such a request, because an expert witness should not be required to give an opinion until he knows the assumed facts. The witness may even ask for an hour or two, or a day for that matter, to study the question.

In the framing of hypothetical questions, the question must fairly reflect the pertinent facts. It need not contain all the proven facts to the case. It may omit entirely certain facts, or it may completely ignore, in whole or in part, the testimony of certain witnesses, but it may not omit a material fact which is essential to an intelligent opinion. Each fact which is incorporated in the hypothetical question must be supported by sufficient evidence to warrant the submission of such fact to the jury. If the evidence in

support of certain claimed facts is weak, inclusion of those facts in the question should be omitted, if this can be done and the question still elicit the answer wanted, because if such facts are assumed and the jury disbelieves them, then the answer falls. If any fact assumed is not proved, the jury is obligated to disregard the opinion answer.

In stating the hypothetical question to the witness, it is not wise, and in fact it is generally held objectionable, to say to him, for example, "John Jones has testified so-and-so in this case," or "William Brown has stated such-and-such in this case," or "The evidence in this case discloses so-and-so." The better form is this: "Doctor, assuming that on the 14th day of January, 1939, a collision occurred between a truck and the person of John Jones, and that as a result of the collision John Jones received a fracture of the skull, and that subsequently thereto, on the blank day, and so on and so forth, his right arm became paralyzed and since then he has not been able to use it, and so on: Doctor, do you have an opinion as to whether such collision was a direct producing cause of the paralysis?" When he says he has an opinion, then he may be asked to state it.

Do not ask an expert to give his opinion in this fashion: "Doctor, you have heard the testimony in this case; what is your opinion as to so-and-so?" The expert should not be asked to give an opinion in such manner, because to do so not only burdens him with the necessity of recalling all the testimony in the case, both material and immaterial, but also requires him to determine the truth or falsity of the testimony of certain witnesses. In effect, he is asked to judge as between witnesses who have related conflicting testimony. However, if the testimony in the case is very brief and uncontradicted, it has been held that, upon making sure the expert has paid attention to the testimony which has been given, his opinion may be asked.

But the expert witness should never be expected to pass upon conflicting testimony.

If the question is purely hypothetical, the answer must be based solely upon it and not upon the expert's personal knowledge of the matters involved. But the expert may be asked a question based in part upon his knowledge of the facts and in part upon the hypothetical facts, provided, of course, that the matters which are within his personal knowledge have been brought to the attention of the court and jury. The expert may, if he wishes, use a text to support his opinion, although, if he does, opposing counsel of course has the right to employ that text in an effort to impeach him.

It is a general rule of evidence that the expert is not permitted to give an opinion as to the ultimate fact in issue. However, the rule is about as much honored in the breach as in its observance; certainly in some cases that type of opinion is permissible. In a malpractice case against a physician, if someone is called as an expert to show that the doctor was guilty of malpractice, the expert will not be permitted to testify that the treatment in question was negligent treatment. Nor, in an action for damages based upon defective construction of a building, could the expert ordinarily say that the framework was negligently constructed. But the doctor, as an expert in a malpractice case, would be permitted to say whether or not the particular treatment given by the defendant was in accord with the usual and customary method of treating that injury in that vicinity. And in the building case, the expert would be permitted to say that the method of construction was or was not a recognized, customary method of construction. On the other hand, in an action on an accident insurance policy where the issue is whether death was due to natural causes or to an injury, most courts would per-

mit an expert to give his opinion as to whether the death was or was not the result of the accident. Such cases are admittedly an exception to the general rule.

Cross-Examination

Even greater care is required on cross than on direct examination, for here there is lacking the cooperation existent in the other situation. The first issue to be decided—and an important one—is this, Should the witness be cross-examined at all? The answer depends largely on the impression made by the expert in advance of trial or on his direct examination. Prior to the time for cross-examination, therefore, opposing counsel should inquire into his general ability, his weaknesses, his foibles, his peculiarities, and whether he classifies as one honest and qualified, dishonest and qualified, honest and unqualified, or dishonest and unqualified. Observe the impression that he is making on the jury during the direct examination—his apparent attempt to cover up something, or exaggerate something, or to avoid certain facts in the case. Observe his indulgence in generalities, or his failure to be specific in anything. In other words, study him carefully just as one would any other witness. If these criteria raise a doubt whether to cross-examine, it is wise to refrain.

Many times the situation is such that if the expert is not cross-examined, defeat appears inevitable. When that is the case, cross-examine, but proceed cautiously. As a general rule, avoid cross-examining as to matters with which the expert has dealt at length, and as to which he has come to court fully prepared; it is often preferable to confine the cross to details which may reveal a source of weakness in the expert's verbal artillery. Thus if a physician-expert seems weak on anatomy, questioning along this line may produce favorable results. The writer recalls in

this connection his defense of a malpractice suit in which several doctors testified for plaintiff in the capacity of experts. The defendant doctor remarked of one of these men, "This doctor is notoriously weak on anatomy." Consequently, on cross-examination that witness was asked questions which to most physicians would be quite elementary. He did become confused, unable to say, for instance, whether it is the tibia or the fibula that contacts and makes the joint with the femur, or whether the candyles are to be found on the femur rather than the tibia. The result was that this supposed expert became so completely at sea that the jury evidently did not pay a bit of attention to his testimony. Where the client is not, as he was here, himself a doctor, it is at times an effective step to call in a doctor to sit at the trial table and assist on the cross-examination of an opposing doctor. It should be cautioned, however, that in resorting to the kind of questioning just suggested, a lawyer should avoid giving the jury the impression that he is showing off his own knowledge.

If bored with one of those doctors who think it their duty to fight their patients' legal battles, it will often be wise to interrogate him regarding matters having nothing to do with his patient's immediate treatment. The writer, as defense counsel in a case involving injury to a boy on a bicycle, once found this procedure successful in such a situation. It was admitted that there was no tail light on the bicycle at the time of the collision; and the question was whether or not the accident happened in the night season. On this issue the testimony was very much in conflict. Counsel for plaintiff elicited from this doctor testimony not only on the medical phase of the case but also on the issue of whether the accident occurred during daylight. As to that he had said that someone telephoned him to

come to the hospital to treat this boy and that he had arrived at the hospital before dark. Since all the rest of plaintiff's witnesses had testified that it was daylight when the accident occurred, presumably the doctor thought it was safe for him to follow suit. But in doing so, he committed a grave error. For it so happened that the defense had both a record of the exact time at which the boy was admitted to the hospital, and the testimony of police, who were at the hospital before the doctor arrived, that it was quite dark when he did come. While that testimony did not determine necessarily that it was dark at the time of the accident, it so completely destroyed the doctor that the jurors refused to believe his testimony. Nor would they believe the similar testimony of plaintiff's other witnesses. The trial resulted in a verdict for the defendant.

Sometimes information valuable for cross-examination of a doctor, especially where he is not altogether honest, frank or fair, can be had by looking at his records. Often his own records will not bear out the diagnosis, the extent of treatment, or the disability to which he has testified. Illustrative is one case in which plaintiff's doctor came in with about 16 X-rays and testified at great length without any interruption by counsel. To each X-ray he had attached a slip of paper containing his reading of it. It so happened that on direct examination he had testified, by way of introduction, that he didn't know until the previous day this case was coming up in court, and therefore had not had much opportunity to familiarize himself with it. On cross-examination, instead of going into a lot of matters dealing with his opinion, he was asked the purpose of the papers attached to the X-rays. "Well," he said, "that's to help the jury; it's much better if the jury can have before them the X-ray and the reading." On being queried whether this was customary, his reply was, "Only when I

know I shall have to testify. I always do it when I know the case is coming up in court. I learned of the case yesterday, so I told my secretary to make those up." After being questioned as to how many times he had previously testified in court, he was dismissed. Offered in evidence, the slips were shown to carry the date when typewritten, in each case a date six months prior to the trial. The effect on the jury was quite apparently to make it feel that this doctor was trying to "pull a fast one."

CONCLUSION

These suggestions are offered, not as absolute guides, but as practical matters for consideration in trial preparation and practice. Arising out of actual experience, they are passed along to other lawyers, young and old, in the hope that they will be found valuable to them in their practice.